NO. 92-334

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

FILEMON SOTELO SANCHEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner was denied the rights guaranteed to him by the Fifth Amendment to the United States Constitution when the United States Court of Appeals for the Fifth Circuit rendered a decision that is contrary to other decisions of that Court on the same matter.

FILEMON SOTELO SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Filemon Sotelo Sanchez respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on May 19, 1992, styled United States of America v. Filemon Sotelo Sanchez, 961 F.2d 1169 (5th Cir. 1992).

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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OPINION BELOW

The opinion of the court of appeals, styled *United States of America v. Filemon Sotelo Sanchez*, 961 F.2d 1169 (5th Cir. 1992), was entered on May 19, 1992. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition is filed within ninety (90) days from May 19, 1992, the date on which the opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered. SUP.CT.R. 13.1. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. § 3231.

On December 7, 1988, Juan Aron Sanchez, Petitioner's brother, and Jose Naegele were arrested by police officers with the New Mexico State Police Department after marijuana was discovered in the pickup truck that Naegele was driving. Naegele eventually pled guilty to an information in the state of New Mexico resulting from the discovery of marijuana in his truck. Although Sanchez was arrested at the time of the discovery of the marijuana, he was never formally charged, either by New Mexico State authorities or New Mexico Federal authorities, for this incident.

On June 1, 1989, Fausto Chavez Duran and David Chavez Duran were arrested at the United States Border Patrol checkpoint on Interstate 10, four miles west of Sierra Blanca, Texas, after 94 pounds of marijuana were discovered in a hidden compartment in the bed of the pickup truck they occupied. An address book was discovered with "Juan Aron Sanchez, 591-3890 and 858-8528" written in it.

Thereafter, on September 1, 1989, court-approved wiretaps were obtained for telephone numbers 915-591-3890, subscribed to by Sanchez Brothers Builders, Incorporated, at 492 Mockingbird, El Paso, Texas, and 915-858-8528, subscribed to by Rebeca Brito, at 819 Amiens Street, El Paso, Texas, for a 60 day period. During the course of the wiretaps, conversations involving Petitioner were intercepted on five separate occasions, twice on September 7, 1989, once on September 9, 1989, and twice

on September 14, 1989.[1]

On September 11, 1989, Ivan Aris Flores was arrested at the Sierra Blanca checkpoint after agents discovered approximately 330 pounds of marijuana hidden in the fuel tanks of a semi-truck, tractor and trailer that he was driving. The truck was registered to Abel Flores, Ivan's brother. Petitioner's business card was discovered in Flores' wallet.

On September 19, 1989, Jose Luis Villarreal was arrested at the Sierra Blanca checkpoint after agents discovered ten pounds of marijuana wrapped in clear cellophane and then wrapped in duct tape hidden in the gas tank of the vehicle.

On May 16, 1990, Petitioner was named in Counts One, Two, Six, Eight, Twenty-Three, Twenty-Four, Twenty-Five, and Twenty-Six of a Twenty-Seven (27) count indictment that charged him with the following offenses: Count One, conspiring with 19 named individuals and with other unknown persons to possess in excess of 100 kilograms of marijuana, a Schedule I Controlled Substance, contrary to Title 21, United States Code, Sections 841(a)(1) and 846; Count Two, conspiring with the same 19 named individuals and with other unknown persons to import a quantity of marijuana, a Schedule 1 Controlled Substance, into the United States from Mexico, contrary to Title 21, United States Code, Sections 952(a) and 960(a)(1). Count Six, possessing with the intent to distribute a quantity of marijuana, a Schedule I Controlled Substance, contrary to Title 21, United States Code, Section 841(a)(1); and Counts Eight, Twenty-Three, Twenty-

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[1] These five conversations formed the sole basis for the charges that were eventually lodged against appellant.

Four, Twenty-Five, and Twenty-Six, using a communication facility, that is, a telephone, to facilitate the commission of a felony, to wit: violation of Title 21, United States Code, Section 841(a)(1), possession of a Schedule I Controlled Substance, marijuana, with the intent to distribute it, in violation of Title 21, United States Code, Section 843(b). The government moved to amend the indictment by striking counts 2, 7, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 25, and 26 in their entirety. The Court granted the motion, leaving a 12-count indictment, with Petitioner named in Counts One, Six, Eight, and Twenty-Four.

Petitioner entered a plea of not guilty and jury trial commenced on October 22, 1990. On October 24, 1990, at the close of all the evidence, the Court granted Petitioner's motion for judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure as to Count Eight of the indictment, but denied it as to the remaining counts. On October 25, 1990, the jury returned verdicts of guilty as charged in Counts One, Six, and Twenty-Four of the indictment.

On December 13, 1990, the Court sentenced Petitioner to ninety-seven (97) months of imprisonment followed by five (5) years of supervised release as to Count One, sixty (60) months of imprisonment followed by three (3) years of supervised release as to Count Six, and forty-eight (48) months of imprisonment followed by one (1) year of supervised release as to Count Twenty-Four, the sentences imposed in Counts Six and Twenty-Four, to be served concurrently with that imposed in Count One. Petitioner was also ordered to pay a fine of $10,000.00. Petitioner timely filed his notice of appeal.

On appeal, Petitioner argued, *inter alia*, that the evidence presented by the government was legally insuf-

ficient to establish beyond a reasonable doubt his knowledge of, intention to join, and voluntary participation in an agreement to violate the law. The only evidence implicating Petitioner in said conspiracy was the testimony of F.B.I. Agent May in which he gave his opinion as to the meaning of certain words and phrases contained in the five conversations mentioned above between Petitioner and other individuals that were intercepted by the government. Based upon his interpretation of these conversations, May testified that it was his belief that Petitioner was a knowing member of said conspiracy. Petitioner argued that it was just as reasonable to believe that these conversations were not related to any conspiracy, but were in fact either business related or simply just expressions of concern for close friends who were involved.

The Fifth Circuit disagreed, holding first that:

> "The United States introduced into evidence several taped phone conversations involving Filemon and other named co-conspirators. The substance of the conversations and the meaning thereof was elaborated upon by agent May. Agent May testified that Filemon's use of certain terminology, in the context of the conversations, demonstrated Filemon's role as a principal in a large marijuana conspiracy. This testimony was predicated on agent May's characterization of specific terminology as coded terminology. These coded terms, testified agent May, represented variously marijuana, methods of transportation, the receipt of large quantities of marijuana and money to be paid for marijuana."

United States v. Sanchez, supra, 961 F.2d at 1174. The Court then held that May's interpretation of these conversations would permit a reasonable jury to find Petitioner

guilty beyond a reasonable doubt of the conspiracy charges against him.

> "It appears the jury in this case simply chose to believe the testimony of agent May. Moreover, the opposing theory of innocence put forth on appeal by Filemon does not fall into the realm of what an appellate court could reasonably conclude is a theory of innocence equally or nearly equally supported by the evidence as the theory of guilt."

Id. at 1175.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS RENDERED A DECISION THAT IS CONTRARY TO OTHER DECISIONS OF THAT COURT ON THE SAME MATTER.

The Court has rendered a decision that is contrary to other decisions of the Fifth Circuit holding the evidence to be insufficient to support a conspiracy conviction. The law in the Fifth Circuit with respect to sufficiency of the evidence has always been that where the "evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged [the conviction must be reversed]." *United States v. Fortenberry*, 919 F.2d 923, 926 (5th Cir. 1990) (quoting *Clark v. Procunier*, 755 F.2d 394, 396 (5th Cir. 1985)). "This is so because ... where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the verdict, 'a reasonable jury *must necessarily entertain* a reasonable doubt.' " *United States*

v. Menesse, 962 F.2d 420, 426 (5th Cir. 1992). Aside from the five intercepted conversations involving Petitioner, there was no other evidence to connect him with the marijuana conspiracy alleged in the indictment. And the substance of the conversations was subject to different interpretations, both innocent and, as May testified, indicating guilt. For example, in one conversation Petitioner, who was in the construction business, was informing one of the named co-conspirators that "I've got 340 wooden boards." May interpreted this to mean 340 pounds of marijuana. *See* 961 F.2d at 1174-75. Thus, it was clear that an equal or nearly equal theory of guilt and a theory of innocence was supported by the evidence viewed in the light most favorable to the verdict. Prior Fifth Circuit case law mandates a reversal in this type of situation. The Fifth Circuit denied Petitioner the rights guaranteed to him by the Fifth Amendment of the United States Constitution by refusing to do so.

CONCLUSION

For the forgoing reasons, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Filemon Sotelo SANCHEZ, Jose Angel Naegele,
and Rebeca Portillo Brito,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellant,

v.

Ricardo Portillo BRITO,
Defendant-Appellee.

Nos. 90-8739, 91-8023.

United States Court of Appeals,
Fifth Circuit.

May 19, 1992.

Defendants were convicted by jury in the United States District Court for the Western District of Texas, Harry Lee Hudspeth, J., of, *inter alia*, possession with intent to distribute and conspiracy to possess with intent to distribute more than 100 kilograms of marijuana and use of telephone to facilitate commission of a felony. One defendant's postverdict motion for acquittal was granted. The other defendants appealed their convictions, and government appealed the acquittal. The Court of Appeals,

Reynaldo G. Garza, Circuit Judge, held that: (1) convictions were supported by evidence; (2) prosecutor's comments during closing argument did not require reversal of conviction; (3) no fatal variance existed between indictment and proof at trial; and (4) evidence of acquitted defendant's knowledge of conspiracy was insufficient to support his conviction, absent evidence that he intended to join or participate therein.

Affirmed.

Robert Ramos, Hill & Ramos, El Paso, Tex., for Filemon Sotelo Sanchez.

Douglas Gelo, El Paso, Tex. (Court-appointed), for Jose Angel Naegele.

Charles Louis Roberts, El Paso, Tex., for Rebeca Portillo Brito.

Diane D. Kirstein, Asst. U.S. Atty., Joan E.T. Stearns, Richard L. Durbin, Jr., Asst. U.S. Atty., San Antonio, Tex., for U.S.

Appeals from the United States District Court for the Western District of Texas.

Before POLITZ, Chief Judge, REYNALDO G. GARZA and WIENER, Circuit Judges:

REYNALDO G. GARZA, Circuit Judge:

This is a consolidated appeal from a rather large marijuana conspiracy trial. Appellants Rebeca Portillo Brito (Rebeca), Filemon Sotelo Sanchez (Filemon), and Jose

Angel Naegele (Naegele), and appellee Ricardo Portillo Brito (Ricardo),[1] were all named in a 27 count indictment alleging, *inter alia*, violations of 21 U.S.C. §§ 841(a)(1) and 846, possession with intent to distribute and conspiracy to possess with intent to distribute more than 100 kilograms of marijuana, and 21 U.S.C. § 843, use of a telephone to facilitate the commission of a felony. After a jury trial, Filemon was convicted of the conspiracy, possession and telephone counts and Naegele, Rebeca and Ricardo were each convicted of one conspiracy count[2] Ricardo's post-verdict motion for acquittal was granted by the district court. Filemon, Rebeca and Naegele all appeal their convictions, while the United States appeals the post-verdict judgment of remittal granted to Ricardo.

I. FACTS

On December 7, 1988, Naegele was arrested in New Mexico as he drove a pickup truck with approximately 100 pounds of marijuana. Accompanying Naegele was Jose Aron Sotelo Sanchez (Juan), a named co-conspirator and brother of Filemon, who drove a Pontiac Fiero with a CB radio identical to that in Naegele's truck and tuned to the same channel.[3] Naegele told police he had transported

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[1] Appellee Ricardo Portillo Brito is the brother of appellant Rebeca Portillo Brito.

[2] Naegele was named only as a defendant in Count One of the indictment, the central conspiracy count, while Rebeca and Ricardo were named in Count One as well as Count Twenty-Seven, an illegal use of the telephone count. The district court granted a judgment of acquittal as to Count Twenty-Seven, finding that because the conversation occurred *after* the overt acts of the conspiracy, it was not a conversation *in furtherance of* the conspiracy.

[3] Juan Sanchez was named in the 27 count indictment along with the appellants and appellees in this appeal. His separate convictions for conspiracy and illegal use of the telephone were challenged in this court

marijuana on one other occasion. He stated he had known Juan Sanchez for three months. Naegele pled guilty to state charges under New Mexico law; charges were never formally sought against Juan.

On June 1, 1989, Border Patrol agents at the Sierra Blanca check point near El Paso, Texas, found 94 pounds of marijuana in a pickup truck they had pulled over for secondary inspection. The name "Juan Sanchez" was found next to two phone numbers, one for "Sanchez Brothers Builders, Inc." at 492 Mockingbird, the El Paso residence of Filemon, and the other for the El Paso residence of Rebeca and her common law husband Juan Aron Sotelo Sanchez.

Wiretaps of the two phones were authorized. During the 60 days the phones were tapped, the FBI intercepted approximately 5000 phone calls.[4] Numerous calls concerned conversations in which elaborate codes were used to conceal drug related matters. Rebeca was recorded making plane reservations for her husband Juan and co-defendant Rafael Ramirez Valdez (Ramirez), for a trip to Midland-Odessa in Texas. Named co-conspirator Bivian Madrid Villalobos phoned Juan at his residence and discussed a marijuana deal in code. Filemon, two days after the Villalobos conversation with Juan, spoke with the Flores brothers [5] in Dallas and stated he had "340 wooden

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Footnote 3 continued.

on evidence of the grievance grounds. In an unpublished opinion on the summary calendar, a panel of this court affirmed his convictions. *See United States v. Juan Sotelo Sanchez*, 953 F.2d 642 (5th Cir.1992) (unpublished).

[4] This figure includes wrong numbers and busy signals.

[5] The Flores brothers, Ivan and Abel, were named co-conspirators who resided in Dallas, Texas.

boards." Two days later, the Flores brothers arrived in El Paso. The day after their arrival, a pinata[6] party was held for the child of Rebeca and Juan. Numerous defendants were present at the party as well as friends and family members of Rebeca and Juan.[7] On September 11, 1989, the day after the party, Ivan Flores was arrested outside El Paso on Interstate Highway 10. He was driving a semi-truck with trailer, the gas tank of which was found to contain 330.5 pounds of marijuana. Intercepted phone calls involving Filemon and Juan indicated their extensive knowledge of and participation in this particular seized shipment. Inside the driver's wallet were found a business card for Sanchez Brothers Builders, Inc., with the same phone number on it, and another card with the name "Chico"[8] and the notation "Home 858-8528," the home phone of Rebeca and Juan. The day after this seizure, a coded phone conversation between Ramirez and Juan relating the fact of the bust was intercepted. Later the same day, a conversation between Rebeca and her brother, Ricardo, was intercepted in which Rebeca related the facts of the Flores brothers' bust and in which both she and Ricardo expressed remorse and concern over the seizure.[9]

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[6] A pinata is a decorated clay jar filled with candy and struck with a stick by children to release the candy. It is a traditional aspect of Mexican celebrations of childrens' birthdays and is common at Christmas. *See* Webster's Third New International Dictionary 1717 (3rd ed.1981).

[7] The record indicates witnesses for the government admitted they had no knowledge that any drug related activities were discussed at the pinata party.

[8] "Chico" was an alias determined to belong to Juan Aron Sotelo Sanchez.

[9] The fact that this conversation concerned the marijuana seizure involving the Flores brother was admitted to by Rebeca.

Six days after this last phone call, the FBI intercepted a call from Ramirez to Juan in which a 10 pound load of marijuana was discussed. The next day, the Border Patrol at the Sierra Blanca checkpoint intercepted a car with 10 pounds of marijuana in the gas tank.

II. DISCUSSION

A. FILEMON SOTELO SANCHEZ

1. *Sufficiency of the Evidence*

In his first point of error, Filemon contends the evidence was insufficient to support his convictions. He claims the government failed to establish that he joined the conspiracy, had knowledge of the conspiracy, and that he voluntarily participated in the conspiracy. The sole basis of this claim is that the testimony of the government's main witness, F.B.I. case agent William J. May (agent May), as to the meaning of certain code words could just as easily have been disbelieved as believed by the jury. Because the testimony of agent May was the sole inculpatory evidence against Filemon, its susceptibility to equally different interpretations requires the reversal of the possession and telephone use convictions as well.

[1-3] The well established standard in this circuit for reviewing a conviction allegedly based on insufficient evidence is whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt. *United States v. Gonzales*, 866 F.2d 781, 783 (5th Cir.), *cert. denied*, 490 U.S. 1093, 109 S.Ct. 2438, 104 L.Ed.2d 994 (1989). The evidence adduced at trial, whether it be direct or circumstantial, together with all inferences reasonably drawn from it, is viewed in the light most favorable to the verdict. *United States v. Pigrum*,

922 F.2d 249, 253 (5th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2064, 114 L.Ed.2d 468 (1991). The assessment of the weight of the evidence and the determination of the credibility of the witnesses is solely within the province of the jury. *United States v. Martin*, 790 F.2d 1215, 1219 (5th Cir.), *cert. denied*, 479 U.S. 868, 107 S.Ct. 231, 93 L.Ed.2d 157 (1986). If the "evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged," this court must reverse the convictions. *Clark v. Procunier*, 755 F.2d 394, 396 (5th Cir.1985) (*quoting Cosby v. Jones*, 682 F.2d 1373, 1383, (11th Cir.1982) (*as quoted in United States v. Fortenberry*, 919 F.2d 923, 926 (5th Cir.1990)). This is so because, as was observed by the late Judge Alvin B. Rubin, where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the verdict, "a reasonable jury *must necessarily entertain* a reasonable doubt." *Id.* (*quoting Cosby* at *id.*). With the scope of our rewiew thus defined, we proceed to the merits of Filemon's claims on appeal.

[4,5] To establish guilt of a drug conspiracy, it must be proven that an agreement with intent to distribute existed, that the defendant had knowledge of the agreement, and that the defendant voluntarily participated in the conspiracy. *United States v. Lewis*, 902 F.2d 1176, 1180 (5th Cir.1990). An agreement may be inferred from concert of action, participation from a "collocation of circumstances," and knowledge from surrounding circumstances. *United States v. Espinoza-Seanez*, 862 F.2d 526, 537 (5th Cir.1988). Mere presence at the scene and close association with those involved are insufficient factors alone; nevertheless, they are *relevant* factors for the jury. *United States v. Simmons*, 918 F.2d 476, 484 (5th Cir.1990).

[6] The United States introduced into evidence several taped phone conversations involving Filemon and other named co-conspirators. The substance of the conversations and the meaning thereof was elaborated upon by agent May. Agent May testified that Filemon's use of certain terminology, in the context of the conversations, demonstrated Filemon's role as a principal in a large marijuana conspiracy. This testimony was predictated on agent May's characterization of specific terminology as coded terminology. These coded terms, testified agent May, represented variously marijuana, methods of transportation, the receipt of large quantities of marijuana and money to be paid for marijuana. For example, the government introduced a phone conversation between Filemon and named co-conspirator Abel Flores, intercepted on September 7, 1989. During the conversation, Filemon informs Abel Flores "I've got 340 wooden boards." Two hours later, another phone conversation was intercepted between Filemon and named co-conspirator Victor Manuel Ramirez (Victor). This conversation, in part, was as follows:

> Filemon: ... pick up [a van] because I am going to need it. It already rained ... it already rained on me.
> Victor: Already?
> Filemon: Yes, a lot.
> Victor: That's good.
> Filemon: A lot.
> Victor: Don't leave me out.
> Filemon: No.
> Victor: OK.
> Filemon: Three forty ...
> Victor: Uyyy.
> Filemon: ... fell on me.
> Victor: Yeah?
> Filemon: Yeah.
> Victor: That's good. And it is already here?
> Filemon: Already ... I already have it in my hands.

On September 9, 1989, two days after Filemon's conversation with Victor, Ivan Flores phoned Juan to inform Juan that Ivan and his brother, Abel Flores, were in El Paso at the Comfort Inn. Later that same day, Ivan Flores phoned Filemon to inform him of the presence of the Flores brothers at the Comfort Inn. On September 11, 1989, Ivan Flores was arrested at the Sierra Blanca checkpoint driving a semi-truck laden with 330.5 pounds of marijuana. On September 14, 1989, Filemon spoke with Ivan Flores' father who had called Filemon to seek assistance in the selection of an attorney for Ivan. During this conversation, Filemon mentioned that Ivan Flores was with Filemon in El Paso. That same day, a conversation between Filemon and an unidentified woman named Omega[10] revealed Filemon's frustration with the arrest of Ivan Flores at the "mountain" and his surprise that the Border Patrol agents appeared to have been waiting for him. This conversation, in part, was as follows:

> Filemon: A really bad incident (percance) that happened to us, "PRIMA."
> Omega: Yeah. Oh, my God.
> Filemon: Yes, can you believe that?
> What I sent over there....
> Omega: Eh?
> Filemon: ... what I sent over there.
> Omega: Uh huh.
> Filemon: ... to hell.
> Omega: Oh, my God.
>
> . . . . .
>
> Filemon: And the worst part of it is that they were already waiting for him.
>
> . . . . .

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[10] Omega was also referred to by Filemon as "Prima," the Spanish word for "cousin." *See* Vox Compact Spanish and English Dictionary 200 (Softcover ed. 1989).

Omega: And was it when he was just leaving?
Filemon: No, over there in ... in uh ... you know where.
Omega: Yeah?
Filemon: Over there on the mountain.

Filemon appears to argue that because he was involved in the construction business, the reference to "340 wooden boards" was just that, a reference to 340 actual wooden boards. Agent May testified that Filemon's use of the phrase "340 wooden boards" was a reference to 340 pounds of marijuana. Additionally, he testified that Filemon's use of the phrase "it rained on me" was a reference to the receipt of marijuana and that the phrase "three forty ... fell on me" was a further reference to receipt of the specific amount of 340 pounds of marijuana. Further evidence, as noted above, disclosed the seizure of 330.5 pounds of marijuana being transported by Ivan Flores. Government witnesses testified that it is not uncommon for amounts of marijuana to vary by as much as 10-20 pounds, thus explaining the discrepancy of the weight of the marijuana actually seized from that discussed in the Filemon/Victor phone conversatioin of September 7, 1989.[11] Moreover, the "Sanchez Brother's Builders, Inc., F.S. Sanchez, President" business card was found in Ivan

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[11] At oral argument, it was brought to our attention that the weight of the marijuana seized on September 11, 1989, when finally weighed by government chemists, was actually 285 pounds. This is indeed supported by the record. Appellants in this case suggested that this discrepancy tended to undermine the credibility of agent May's assertion that the reference to "340 wooden boards" was a code for 340 pounds of marijuana. Additional testimony as to the weight of the marijuana, however, indicated that as much as a 10 pound discrepancy could be attributable to the drying of the marijuana and a discrepancy of between 10 to 20 pounds of weight was attributable to the packaging of the marijuana. These amounts, coupled with the testimony regarding the frequent variations in weights of shipments of between 10 to 20 pounds, provided the jury with more than an adequate basis to accept agent May's interpretation of the phraseology.

Flores' wallet. The term "mountain" was identified as a term commonly used to describe the area where the Sierra Blanca checkpoint was located. Finally, testimony at trial revealed that the semi-trailer pulled by the truck driven by Ivan Flores was a refrigerator trailer, not the type of trailer normally used for the transportation of construction materials; no evidence of the presence of any construction materials on the trailer was presented at trial.

[7-10] We find the above recited facts would permit a reasonable jury to find Filemon guilty beyond a reasonable doubt of the conspiracy charges against him. It appears the jury in this case simply chose to believe the testimony of agent May. Moreover, the opposing theory of innocence put forth on appeal by Filemon does not fall into the realm of what an appellate court could reasonably conclude is a theory of innocence equally or nearly equally supported by the evidence as the theory of guilt. Because agent May's testimony regarding the code words was believed by the jury, Filemon's challenge to the conviction for the violation of 21 U.S.C. § 843, illegal use of the telephone, must also fail. In addition, his challenge to the possession charge lacks merit because the essential elements thereof were proven at trial. The necessary elements to sustain a conviction for possession of marijuana with intent to distribute are that the defendant (1) knowingly (2) possessed the marijuana (3) with intent to distribute it. *United States v. Villasenor*, 894 F.2d 1422, 1426 (5th Cir.1990). Accepting agent May's testimony, the only colorable issues available to Filemon would be that of possession and intent to distribute. Possession may be constructive[12] if evidence indicates the defendant's ownership, dominion and control over the marijuana. *United States v. Richardson*, 848 F.2d 509, 512 (5th Cir.1988). *Here* the evidence shows

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[12] *United States v. Vergara*, 687 F.2d 57, 61 (5th Cir.1982).

Filemon's assertion that the marijuana belongs to him, either individually or as a member of the conspiracy. Intent to distribute is typically inferred from the fact that an amount is too large for any purpose other than distribution. *United States v. Romero-Reyna*, 867 F.2d 834, 836 (5th Cir.1989). Again, here the amount was in excess of 300 pounds. The jury could easily have determined this amount was not for personal use and thus that Filemon intended to distribute it. Even were the issues of Filemon's constructive possession and intention to distribute not so clearly present, we would nevertheless affirm. A conspirator is liable for the substantive offenses of his co-conspirators while he is a member of the conspiracy. *United States v. Garcia*, 917 F.2d 1370, 1377 (5th Cir.1990) (*quoting United States v. Basey*, 816 F.2d 980, 997 (5th Cir.1987)); *See also United States v. Sullivan*, 578 F.2d 121, 122-23 (5th Cir. 1978) (once conspiracy and knowing participation therein established, conspirator deemed guilty of crimes committed in furtherance of conspiracy by other conspirators). Nothing in the record indicates that the guilt of Ivan Flores for the substantive offense of possession with intent to distribute or his membership in the conspiracy was ever questioned.

2. *Improper Prosecutorial Argument*

In his second point of error, Filemon suggests that allegedly improper prosecutorial argumentation requires reversal of his convictions. In closing argument, the prosecutor argued to the jury:

> No, there is another attack by Mr. Ramos [Filemon's defense counsel] on the big bad Government, the agent, the FBI agent. Well, ladies and gentlemen, you are the sole judges of the credibility of the witnesses here. If you think Bill May is a liar, then you go ahead and cut all those people loose. Okay?

This argumentation was objected to by defense counsel and the trial court sustained the objection. The record indicates counsel did not request that the district court give a curative instruction to the jury.

[11] Courts will not lightly reverse a criminal conviction on the basis of a prosecutor's arguments standing alone. *United States v. Young*, 470 U.S. 1, 9, 105 S.Ct. 1038, 1043, 84 L.Ed.2d 1 (1985). Reversible error will result only where it is shown that the jury argument is both improper and harmful. *United States v. Iredia*, 866 F.2d 114, 117 (5th Cir.), *cert. denied* 492 U.S. 921, 109 S.Ct. 3250, 106 L.Ed.2d 596 (1989) (*citing United States v. Lowenberg*, 853 F.2d 295, 301 (5th Cir. 1988)). "The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *Id.* (*citing United States v. Jones*, 839 F.2d 1041, 1049 (5th Cir.1988)). The test that is employed in this circuit requires us to consider "1) the magnitude of the prejudicial effect of the statements; 2) the efficacy of any cautionary instruction; and 3) the strength of the evidence of the defendant's guilt." *Id.* (*citing Lowenberg*, 853 F.2d at 302).

[12] We cannot say, viewing the record as a whole, that the comments of the prosecutor in this case were "so pronounced and persistent that [they] permeate[d] the entire atmosphere of the trial." *Iredia*, 866 F.2d at 117 (*quoting United States v. Williams*, 809 F.2d 1072, 1096 (5th Cir.), *rev'd on other grounds*, 828 F.2d 1, *cert. denied*, 484 U.S. 896, 108 S.Ct. 228, 98 L.Ed.2d 187 (1987)). Thus, the argument did not carry the magnitude of prejudicial effect necessary for the first element of the test to weigh in Filemon's favor. As to the second element of the test, it is clear there was no curative instruction given by the district court. It is also clear, however, that none was requested. Thus, the second element of our test weighs neither in favor

of nor against Filemon. Finally, as we have extensively related, there was more than adequate evidence of Filemon's guilt and thus, the third element of the test weighs against him. Having conducted our analysis, we conclude Filemon has failed to demonstrate the requisite inappropriateness and harm necessary for reversal of his conviction solely on the grounds of improper prosecutorial commentary.

B. JOSE ANGEL NAEGELE

In his sole point of error, Naegele asserts the district court erred in finding sufficient evidence existed to support his conviction because there is a fatal variance between the indictment and the proof adduced at trial. Naegele does not contend the evidence is insufficient to establish any one or more of the elements necessary to prove the conspiracy. Rather, he contends the government proved the existence of multiple conspiracies while the indictment alleged only a single conspiracy. He asserts that his membership in a single conspiracy is undermined because 1) there is a six month lapse in time between his arrest in New Mexico in 1988 and the next seizure of drugs at the Sierra Blanca checkpoint in 1989, 2) the alleged acts of the conspiracy took place in different states, and 3) there is no evidence of his continued participation in the conspiracy after his arrest in 1988. Naegele candidly recognizes that a single conspiracy is not transformed into multiple conspiracies simply by lapse of time, change in membership, or change in geographical emphasis.[13] *United States v. De Varona*, 872 F.2d 114, 119 (5th Cir.1989).

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[13] Naegele's candid presentation is refreshing; his brief is well written and concise. Unfortunately, it would appear that no amount of legal reasoning could save the day for Naegele as the record bears out that the facts of his conviction are insufficient for reversal under the principles of conspiracy law as enunciated by this circuit.

[13] Were the principles of conspiracy law not weighed so heavily in favor of the affirmance of Naegele's conviction, we would be inclined to reject his contention nevertheless. In order for Naegele to succeed on his variance theory, he must demonstrate that his substantial rights have been prejudiced. *United States v. Guerra-Marez*, 928 F.2d 665, 671 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 322, 116 L.Ed.2d 263 *and* ___ U.S. ___, 112 S.Ct. 443, 116 L.Ed.2d 461 (1991) (*quoting United States v. Richerson*, 833 F.2d 1147, 1154-55 (5th Cir.1987)). It is by now a well established principle in this circuit that if the government proves the existence of multiple conspiracies "and the defendant's involvement in at least one of them, then clearly there is no variance affecting the defendant's substantial rights." *Id.* at 671-72 (*quoting United States v. L'Hoste*, 609 F.2d 796, 801 (5th Cir.), *cert. denied*, 449 U.S. 833, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980)); *United States v. Martino*, 648 F.2d 367, 382 (5th Cir.1981), *cert. denied* 456 U.S. 943, 102 S.Ct. 2006, 2007, 72 L.Ed.2d 465 (1982) (*citations omitted*).

[14] Viewing the evidence in the light most favorable to the verdict and assuming *arguendo* multiple conspiracies were proven by the evidence, Naegele's participation in at least one conspiracy is amply supported. Testimony of the arresting officers in New Mexico indicated Naegele stated he was operating with Juan Aron Sotelo Sanchez and had done so before on at least one occasion.[14] Both individuals had identical C.B. radios in their vehicles and both radios were tuned to the same

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[14] Naegele gave authorities in New Mexico at least two different versions of his activities, one tending to be exculpatory and the other inculpatory. Because our standard of review requires us to view the evidence in the light most favorable to the verdict, we accept, as apparently did the jury, the version of Naegele's story tending to show his involvement in the conspiracy.

channel. A substantial part of the approximately 100 pounds of marijuana seized from Naegele's truck was in plain view in the passenger compartment and it was Naegele's own statements regarding the location of the remainder of the haul that led the New Mexico officers to remove it from concealed compartments in the truck. Moreover, Naegele informed the New Mexico authorities that Juan Sanchez had placed the marijuana in the pickup in the country of Mexico, that he met Juan Sanchez north of the U.S.-Mexico border, and that he had driven the truck from that point until the time of the arrest. With these facts in evidence, Naegele's rights were not substantially prejudiced even if there is a variance because these facts are sufficient to support a finding that Naegele was guilty of at least one conspiracy involving himself and Juan Sanchez.

C. REBECA PORTILLO BRITO

1. *Sufficiency of the Evidence*

[15] Rebeca argues there was insufficient evidence to convict her as a co-conspirator. As indicated earlier, Rebeca does not challenge her knowledge of the existence of the conspiracy. This knowledge is plainly indicated from an intercepted call between Rebeca and her brother, Ricardo, placed the day after the arrest of Ivan Flores. Although the district court ruled the conversation did not support the substantive offense of use of a telephone in furtherance of a conspiracy,[15] the conversation was admissible as relevant to Rebeca's role in the conspiracy.[16] In the conversa-

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[15] The district court made this ruling because the conversation occurred *after* the substantive acts constituting the conspiracy had transpired. The government has not challenged this decision on appeal.

[16] Rebeca contends the district court erred in admitting the conversa-

tion, Rebeca discussed the arrest of Ivan Flores and expressed dismay and sadness over the loss of the "system," later identified at trial as a code word for the method of transporting the marijuana. Significantly, agent May agreed with the characterization of Ms. Kurita, Rebeca's defense counsel, that the conversation was nothing more than "two individuals [ ] lamenting or discussing the occurrences of the day before...." Record on Appeal, Vol. V, p. 405. Were this the only evidence the jury could consider regarding Rebeca's status as a co-conspirator, we would be loathe to affirm her conviction. Indeed, we are somewhat skeptical of the remaining evidence against her but find, after careful review, that it is sufficient to permit a reasonble jury to reach a verdict of guilty.

At the trial, the government introduced two intercepted conversations of Rebeca making plane reservations for her husband Juan, the principal conspirator, and named co-conspirator Rafael Ramirez Valdez. In both conversations, reservations were made for each individual on the same flight to Midland, Texas. Furthermore, in the conversation regarding reservations for Ramirez, Rebeca used an alias, "Anna," to conceal her true identity. Testimony later revealed the trip to Midland by Juan and Ramirez entailed a rather lengthy visit with an unknown individual driving a vehicle registered to named co-conspirator Bivian Villalobos. The jury could infer from these facts, coupled with the facts of Rebeca's knowledge of the conspiracy and the fact that she lived in the same home with the principal conspirator, Juan Sanchez, that her phone calls to

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Footnote 16 continued.

tion because it was inadmissible hearsay. This contention is without merit. *See United States v. Jones*, 839 F.2d 1041, 1051-52 (5th Cir.), *cert. denied*, 486 U.S. 1024, 108 S.Ct. 1999, 100 L.Ed.2d 230 (1988). (recorded telephone conversation between two defendants not hearsay in conspiracy trial where used to show awareness of, and participation in, conspiracy).

Southwest Airlines were voluntary acts on her part in furtherance of the conspiracy. While we find this evidence to be far from the quantity of evidence against Filemon and other conspirators in this case, we conclude it is sufficient to permit the jury to have reached its decision.

2. *Wiretap Minimization*

In her second point of error, Rebeca argues the government violated 18 U.S.C. § 2510 *et seq.*, which requires the government to minimize its wiretapping activities. The statute requires the government to make reasonable efforts to reduce the possibility of intercepting non-criminally related phone conversations.

At trial, counsel for appellant argued that because all of the named interceptees in the wiretapping order were male, the government should have ceased listening to the conversation as soon as it realized appellant was a female. This position is untenable. The court order authorizing the interception of the calls indicated that the named individuals as well as others not named were the basis for the request. Those not named in the order included persons who, through the interception of calls involving named individuals, were determined to be part of the conspiracy.

[16] In addition, this case is replete with the use of coded drug terminology. Where drug jargon is used over the phone, the government may engage in more extensive wiretapping and the interception of innocent calls may be a more reasonable activity. *United States v. Macklin*, 902 F.2d 1320, 1328 (8th Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 689, 112 L.Ed.2d 680 (1991). In *Macklin*, the Eighth Circuit recognized that the government essentially can listen long enough to determine the call is not relevant to the investigation. *See id.* (government must limit calls to

pertinent investigation *as much as possible*). Here, government witnesses testified that calls were initially listened to in order to determine the scope of the conspiracy. Upon reaching the conclusion that a particular call did not or would not lead to information pertaining to the scope of the conspiracy, the interception ceased. This testimony, combined with Rebeca's use of code words, leads us to conclude her second point of error is without merit.

3. *Ineffective Assistance of Counsel*

In her third and final point of error, Rebeca argues her conviction must be overturned because her counsel was ineffective at trial. She contends tha her counsel failed to file any pre-trial motions, failed to file a written motion to suppress the recorded conversations pursuant to the wiretapping statute, failed to limit the evidence of the recorded conversation with her brother, failed to request the identity of the confidential FBI informants who allegedly could have provided her with exculpatory testimony, and failed to subpoena the same informants.

[17] We do not reach the merits of this point of error and express no opinion thereon. An appellant's failure to present the issue of ineffective assistance of counsel in the district court precludes our review. *United States v. Higdon*, 832 F.2d 312, 314 (5th Cir.1987), *cert. denied*, 484 U.S. 1075, 108 S.Ct. 1051, 98 L.Ed.2d 1013 (1988) (general rule is that claim of ineffective assistance of counsel should not be heard on direct appeal where claim not first raised in district court). Because Rebeca did not raise the claim below, we decline to hear the issue, but do so without impairing her future rights.[17]

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[17] Rebeca additionally argues that the trial court should have granted her a new trial based on the judgment of acquittal granted to her brother.

D. RICARDO PORTILLO BRITO

After the jury returned a verdict of guilty against Ricardo, he moved for a post-verdict judgment of acquittal. The district court granted the motion, reasoning that although the evidence demonstrated Ricardo's knowledge of the conspiracy, it was insufficient to establish beyond a reasonable doubt that he intended to join or participate in the conspiracy. In the words of Judge Hudspeth, "It is possible that Ricardo Portillo Brito participated in the conspiracy, but it is equally possible that he was merely a knowing spectator. Considered as a whole, the evidence fails to establish beyond a reasonable doubt that he was the former rather than the latter."

[18-21] The duty of a district court in ruling on a post-verdict motion for acquittal is to determine, viewing the evidence in the light most favorable to the government, whether the evidence could be accepted by a jury as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. *United States v. Varkonyi*, 611 F.2d 84, 85 (5th Cir.), *cert. denied*, 446 U.S. 945, 100 S.Ct. 2173, 64 L.Ed.2d 801 (1980). An appellate court reviews the trial court's granting of a motion for acquittal *de novo*, applying the same standard as the court below. *Id.* at 85-6. A court may not simply substitute its own views of justice for those of the jury. *Id.* at 86. Finally, the jury alone can assess the weight of the evidence and the credibility of the witnesses. *United States v. Molinar-*

Footnote 17 continued.

This issue is not briefed at all and thus has been abandoned. *See United States v. Lindell*, 881 F.2d 1313, 1325 (5th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2621, 110 L.Ed.2d 642 (1990) (*citing* F.R.App.P. 28(a)(4)). Even were this issue not abandoned, we would reject it for, after an exhaustive search of the record, we are unable to find any indication that Rebeca ever filed a motion for new trial.

Apodaca, 889 F.2d 1417, 1423 (5th Cir.1989).

[22] The sum of the evidence in this case is that Juan and Filemon Sanchez were the principals of a conspiracy. They lived in El Paso, Juan with his common law wife Rebeca. At all times, Ricardo lived in Austin. On September 10, 1989, Ricardo went to El Paso to attend his nephew's first birthday party, a party which was attended by roughly 30 people. In addition to family members and friends, several persons later identified as co-conspirators in this case attended the party. Ricardo was driven by his cousin (a student not implicated in any of the alleged wrongdoing involved in this case) to the El Paso airport in the early evening and he departed for Austin. He appeared at work in Austin on the morning of September 12, 1989, a Monday.

In the latter part of September 12, 1989, a phone call, discussed above, between Rebeca and Ricardo was intercepted in which the two discussed the arrest of Ivan Flores and commiserated over the same.

The United States contends the evidence is sufficient to convict Ricardo. It points to a reference to the City of Austin, along with references to other Texas cities, and reasons "Austin" was a code word for Ricardo. It also suggests that because Ricardo travelled to his nephew's birthday party in El Paso, he can be viewed as having a close family relationship with his sister and thus the conspiracy.[18] Finally, the government refers us to statements made in the Rebeca/Ricardo phone conversation.

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[18] This reasoning we find particularly disturbing No evidence suggests that Ricardo should have anything other than a close relationship with his sister who, as far as the record reflects, is his only sibling.

Initially, we note that Ricardo readily admits to knowledge of the conspiracy. We have additionally discussed agent May's agreement with the characterization of the Rebeca/Ricardo phone conversation. Moreover, all of agent May's testimony regarding the allegedly incriminating aspects of the Rebeca/Ricardo conversation were directed at establishing the conversation as being in furtherance of the conspiracy. The district court rejected this analysis when it granted a judgment of acquittal as to the illegal use of the telephone charges charges against Rebeca and Ricardo. Thus, as discussed previously, the jury could have used the conversation only as evidence of knowledge of or participation in the conspiracy. Again, however, agent May's testimony regarding statements in the conversation concerned acts in the future. Specifically, agent May interpreted statements made by Rebeca as indicating that a shipment of marijuana *would be going to* Ricardo in Austin. Moreover, his interpretation of Ricardo's lamentations was that Ricardo *would not be able to* use the "system" in the future. As to the pinata party, testimony from government agents revealed that there was no basis upon which the jury could conclude that Ricardo participated in any conspiracy related activities while present. Quite simply, there was no evidence presented upon which a reasonable jury could conclude beyond a reasonable doubt that Ricardo participated in the conspiracy. Finally, we note the uncontroverted evidence that Ricardo has been employed as a supervisor of a sealant business in Austin for approximately four years, has an excellent work record, pays his bills regularly, and lives a modest life in a modest home. As to Ricardo, the evidence supports equally or nearly equally a theory of guilt as a theory of innocence.[19] *See*

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[19] We observe, although our analysis does not turn upon, the fact that Judge Hudspeth, the district court judge in this case, has much more than his fair share of experience with the adjudication of criminal drug conspiracies, sitting as he does in El Paso in the Western District of Texas and on the border of Mexico.

Clark, 755 F.2d at 396.

CONCLUSION

We have reviewed all of the contentions by the parties who appear in the posture of appellants in this case and deem them to be without merit. Therefore, finding no merit to the complaints on appeal, the convictions of Filemon Sotelo Sanchez, Jose Angel Naegele and Rebeca Portillo Brito are in all respects AFFIRMED. Additionally, the post-verdict judgment of acquittal granted as to appellee Ricardo Portillo Brito is in all respects AFFIRMED.